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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 161,

CLARENCE A. STEWART, Administrator of the Estate of John
R. Stewart, Deceased, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, a Corporation, *Respondent*.

On Certiorari to the United States Circuit Court of Appeals
for the Eighth Circuit.

PETITION BY RESPONDENT FOR REHEARING.

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To the Honorable, the Supreme Court of the United States:

Comes now Southern Railway Company, respondent in the above entitled cause, and presents this its petition for a rehearing of the said cause and, in support thereof, respectfully shows:

The Circuit Court of Appeals, in the judgment under review (119 F. (2d) 85, R. 436-444) held, as stated by this Court in its opinion (p. 2) that "there was no substantial evidence to sustain the verdict and reversed and remanded with directions to enter a judgment for the respondent."

The court below stated the legal basis of its holding by making a quotation from this Court's opinion in *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, (R. 443) as follows:

" * * * where proven facts give equal support to each of two inconsistent inferences; * * * neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other * * * ."

This Court granted certiorari on a petition asserting that the holding below was erroneous and was a decision of an important question of federal law which had not been, but ought to be, decided and settled by this Court. (Petition, p. 11.)

With great respect we submit that this Court, in its opinion and judgment rendered February 16, 1942, has not decided the question upon which certiorari was granted or, if it has decided it, has left its decision so ambiguous as to constitute an unfortunate precedent, unsettling rather than settling the law, and necessarily leaving the courts below and other courts in confusion as to what the controlling law is.

The effect of the decision below was that the plaintiff in the case had not introduced sufficient evidence in support of her only allegation of negligence (defective coupler mechanism) to sustain the burden of proof which the law casts upon her. If that decision was right, then, under the law as it has always heretofore been understood, judgment must go against plaintiff (petitioner) and in favor of defendant (respondent). See *Pennsylvania R. Co. v. Chamberlain*, *supra*.

As we read its opinion, this Court does not hold that that holding was either wrong or right. This Court does not discuss the burden of proof. It does not decide that the plaintiff's proof was sufficient to sustain the burden, if the burden is by law on plaintiff. In fact it holds to the contrary. It does not decide that the burden was not on plaintiff but was on defendant.

In terms, all that this Court has held is (p. 3):

"We hold that, on this record, neither party is entitled to prevail. If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject."

This necessarily means that on the evidence adduced, on a completed and closed record, the plaintiff had not met the burden of proof and was not entitled to "prevail," was not entitled to judgment. But it further necessarily means, and with great deference we submit inconsistently means, that in such situation the defendant also is not entitled to "prevail," is not entitled to judgment.

We have never before seen a decision to like effect in any reported case by any court. Does it not necessarily result in judicial paralysis? Is it not of the essence of the judicial process that when all the evidence is in, when each party has rested and a record is closed, the court must decide which party is to prevail, which is entitled to judgment?

The view of the dissenters in this case seems clear. The view set forth in the dissenting opinion is that, assuming the burden of proof to have been on the plaintiff, there was sufficient evidence to meet the burden and to sustain the verdict and judgment for plaintiff. The citation by the dissenting opinion of *Ridge v. R. R.*, 167 N. C. 510, 521, *Kirby v. Tallmadge*, 160 U. S. 379, 383, and *Interstate Circuit v. United States*, 306 U. S. 208, 225-226, together with its comments on the failure of the defendant to call witnesses to negative the alleged defective condition of the mechanism, seems to evidence an *a fortiori* view of the dissenters that the burden was not on plaintiff to sustain by proof her allegation of defective mechanism but that the burden was on defendant to negative the allegation.

But it seems obvious that the majority of the Court did not agree with either the primary, or the *a fortiori*, view

of the dissenting justices, else it is inconceivable that there would have been a divided court, 5 to 4.

Disagreeing with the dissent, the majority expressly held that the plaintiff is not entitled, on this record, to prevail. That being so, we respectfully submit that defendant is entitled to prevail, is entitled to judgment *non obstante*, and that the decision by the Court of Appeals was right and should have been affirmed. We believe it to be axiomatic and fundamental that upon a completed trial of a law action, where each party has offered all his evidence and rested, either the one party or the other is entitled as matter of law to prevail, to have judgment. Otherwise the judicial process has failed in its essential function, the function of jurisdiction, which Mr. Justice Holmes, in *The Fair v. Kohler Die & S. Co.*, 228 U. S. 22, 25, defined as "authority to decide the case either way."

We submit that in its decision herein, on the question before it, this Court has in effect, and by inadvertence, failed to exercise jurisdiction in that it has decided neither way, has held "that, on this record, neither party is entitled to prevail."

We understand, of course, that in its order in the final paragraph of its opinion, this Court has reversed the judgment below (which was in favor of respondent) and has remanded the cause to the Circuit Court of Appeals for further proceedings. It expressed no opinion on other errors assigned in the Circuit Court of Appeals which may affect disposition of the cause by that court, thus leaving it open to that court to decide such undecided issues. Conceivably on such further proceedings the Circuit Court of Appeals may hold that petitioner's attack on the release was an incompetent collateral attack on the judgment of the probate court of Illinois denying the charge of fraud or duress, that such judgment is *res judicata*, and hence that the release is a complete defense to the action. If so, judgment must go for respondent notwithstanding the verdict, and regardless of the question of the condition of the coupler. The same result would follow if the Circuit Court

of Appeals should hold against respondent on the issue of *res judicata* and collateral attack but should hold that the evidence was insufficient to support a finding of fraud or duress in the inducement of the settlement and release.

It is only if the Circuit Court of Appeals should hold against respondent on both those additional issues that the decision by this Court on the safety appliance defect question could come into play. That is the event which we understand this Court to have had in mind when it said, "If the issue as to the condition of the coupler mechanism was determinative * * *." In that event, as we understand this Court's decision, the Circuit Court of Appeals cannot affirm the district court's judgment in favor of plaintiff and it cannot do what it did before, reverse and remand with instructions to enter judgment *non obstante* in favor of defendant, action which this Court has reversed. It can follow neither of those courses, because this Court has held that, on this record, neither party is entitled to prevail, and that in the event the condition of the coupler is determinative a new trial should be ordered "so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject."

Thus it seems reasonably clear what the function of the Circuit Court of Appeals would be if it should decide those other, undecided issues against respondent, but we respectfully ask this Court to look somewhat further with us and visualize the quandary in which this Court's present decision leaves the district court below and other trial courts in like cases.

This Court's present decision, if it remains unmodified, is not only the law of this case, binding, in so far as it goes, on the courts below, but it also expresses the federal law as a precedent and theoretically the law as now declared is the law which existed when the district court below tried this case, as well as the law which is to control the district court if and when it enters upon a new trial.

But the district court, on the former trial, and after the jury verdict; was faced with only two possible alternatives, to enter judgment either for plaintiff or for defendant. It had only two motions before it. Plaintiff moved for judgment on the verdict. Defendant moved for judgment notwithstanding the verdict. The court had jurisdiction at that stage of one legal problem, which it had authority and duty "to decide either way": Was plaintiff entitled to judgment or was defendant entitled to judgment?

Plaintiff was relying on her jury verdict and on her evidence as sufficient to support it. She was not moving to set aside her own verdict and for a new trial to enable her to question the foreman or others more at length as to the condition of the coupler mechanism. She undoubtedly would vigorously have resisted such a suggestion. She was willing to risk the accuracy of her or of her counsel's judgment as to the sufficiency of her evidence.

Under this Court's decision it was the duty of the district court, at that stage, to make a hitherto unprecedented exercise of jurisdiction, to hold that neither party was entitled to prevail, to hold that neither party was entitled to judgment, and *ex mero motu* to set aside the verdict which plaintiff was not asking to have set aside and to grant plaintiff a new trial which she was not seeking, to the end that there might be a fuller examination of the foreman, because the court itself, not either of the parties, was, or under this Court's decision should have been, dissatisfied with the state of the record.

If the law puts the burden of this issue on the plaintiff, and we are assured by all the precedents that it does, then the effect and necessary result of this Court's decision is that where the plaintiff fails to sustain the burden of proof then the trial court cannot enter judgment for the defendant but must of its own motion avoid the proceedings and grant a new trial to give the plaintiff a new chance to make a case.

The situation is equally anomalous if it be assumed, as the dissenters imply but as this Court does not hold, that

the burden is on the defendant to prove that the mechanism was not defective. If that be assumed, then the necessary result of this Court's decision is that where the defendant fails to sustain the burden resting upon it, leaving the record, as this Court holds the present record to be, unsatisfactory and insufficient to enable a proper determination of the issue of defect *vel non*, even in that event the trial court cannot give judgment for the plaintiff but must grant a new trial, on its own motion, to give the defendant a new chance to meet its burden.

With great deference, we submit that the present decision of this Court introduces a wholly new and a wholly unworkable concept into the substantive and the adjective law, which can but throw the law into uncertainty and confusion and introduce insoluble problems into the practice.

We respectfully submit that the decision by this Court eliminates all legal effect of the burden of proof and necessarily means that decision in a tort action is not to be determined by the hitherto accepted test that the party upon whom the burden rests must sustain the burden or lose, but means that wherever a court feels that the party upon whom the burden rests has not met the burden and that there is no sufficient evidence upon which to determine the ultimate truth of a fact in issue, then the court must avoid the proceedings and grant a new trial, regardless of the views of the parties, so that the facts may be more fully explored.

This would violate the fundamental maxim that there should be an end of litigation. A party could always take two bites at the "cherry" of litigation. And no reason is seen why the principle should be limited to two bites. The bites might be successive and continuous so long as a court is unconvinced by the evidence of the ultimate truth of a fact in issue, regardless of where the burden of proof rests.

Even if the Court does not agree with the views which we above express, we submit that for another and entirely cogent reason this Court should grant rehearing and should affirm the judgment of the Circuit Court of Appeals.

We submit, for the reasons and upon the authorities set out in our main brief to this Court under Point Three, pages 40 to 45, that there is an obvious and complete support of the judgment of the Circuit Court of Appeals in respondent's defense that the judgment of the probate court of Illinois, holding against the widow-administratrix on her charge of fraud and duress in the inducement of the settlement proceedings and release, is *res judicata* and could not be collaterally attacked by the plaintiff in the district court below. We submit this particularly on the authority of *Chicago, R. I. & P. Ry. Co. v. Schendel*, 270 U. S. 611, which we think is controlling on this issue.

That there should be an end of litigation is not only a general principle, but it is peculiarly applicable in this case. The deceased, who died over five years ago, left as his only dependent, and hence as the only beneficiary under the Federal Employers' Liability Act, his widow. His widow died pending the appeal to the Circuit Court of Appeals. No one remains interested in petitioner's cause of action except non-dependent next of kin and attorneys. The petitioner, in his brief to this Court, expressly asked this Court to review all of the assignments of error in the record before the Court of Appeals. We asked this Court, *inter alia*, under the doctrine that a respondent can rely in support of the judgment below on any ground which would support that judgment presented to but undecided by the Circuit Court of Appeals, to affirm the judgment of the court below on the ground of *res judicata*, collateral attack, and the bar of the release.

It would seem to us entirely futile for this case to be remanded to the Circuit Court of Appeals for further proceedings there, with the possibility of a remand to the district court for a new trial, of a further appeal to the Circuit Court of Appeals, and of a further attempt by certiorari to review the cause in this Court, and with the possibility of still further proceedings thereafter, when this Court has before it now an issue wholly determinative of this cause, with plain power, under the doctrine of *Story Parchment*

Co. v. Paterson Parchment Paper Co., 282 U. S. 555, to render on this issue such judgment as the Circuit Court of Appeals should have rendered upon it had it passed upon it.

Therefore, in any event, we submit that this Court should affirm the judgment of the Circuit Court of Appeals on the ground of *res judicata* and collateral attack, which leaves the release given respondent by the deceased administratrix binding and a complete defense to this cause of action.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit be, upon further consideration, affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

SIDNEY S. ALDERMAN,
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